



U.S. Citizenship
and Immigration
Services

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File: SRC 03 260 50030 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:

Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its general manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a limited liability corporation organized in the State of Florida that is engaged in paper exporting activities. The petitioner's subsidiary, [REDACTED] formed in June 2003, operates an oil change and lube business. The petitioner claims that it is the subsidiary of [REDACTED] C.A., located in Maracay, Venezuela. The beneficiary was initially granted a two-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay for three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director's denial was "capricious and arbitrary, as she offers no support from the evidence for her conclusion to deny the petition" and "provides no analysis of the evidence and documentation submitted by the petitioner." Counsel submits a letter in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the initial petition, the petitioner submitted a letter dated September 21, 2003, signed by the beneficiary, which describes his duties as follows:

I will continue to fill the position of General Manager of the United states entity. This position is a key managerial position in our U.S. company as I will direct the management of the organization, plot strategies for the expansion of our business in Miami, develop business objectives and time tables within which they are to be completed and improve communications between the U.S. and Venezuelan companies.

As General Manager, I am also responsible for networking with business industries in community to identify and cultivate new information sources, analyzing exports to Venezuela, analyzing investment opportunities, and negotiating contracts with suppliers. Additionally, I handle all personnel decisions for [the petitioner.] I have the responsibility to do the job descriptions of the personnel, hiring, firing and placing all of [the petitioner's] employees within the United States as necessary as well as overseeing lower level management.

A September 22, 2003 letter from the petitioner's previous counsel, also submitted with the initial petition, provides the following description of the beneficiary's job duties:

As its General Manager, [the beneficiary] is responsible for all of the administrative decisions of the company, for all marketing activities of the U.S. entity, and for the overall performance of the company. He has the discretion over all full-time, long-term personnel decisions for the company, and directly supervises their activities. His management of the full-time employees,

as well as the accountant, is an essential function of the organization. He negotiates contracts on behalf of the corporation and oversees the day-to-day operations of the company.

As the company continues to grow, and more employees are to be hired, he will directly supervise and will have the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, he will function at a senior level within the Organizational hierarchy or with respect to the function manager. [The beneficiary] also exercises discretion over the day to day operations of the activity or function for which he has authority.

* * *

[The beneficiary] will be in the position described 100% of the time. It is anticipated that his time will be devised as follows:

- (10%) Plot strategies for the expansion of the business, contracts and negotiations, and develop financial objectives.
- (10%) Networking with business industries in the community to identify and cultivate new information sources.
- (10%) Communicate with various suppliers, distributors, clients and potential clients related to of [sic] paper products and oil and lube services.
- (5%) Maintain regular communication with foreign parent company.
- (65%) Monitor the activities of all employees. Manage the overall activities of the company; handle and/or supervise the administration and finances of the company. Evaluate and review the services ultimately provided by the company to ensure it meets proper specifications as per customer, and the products to ensure conformity with standards.

On October 6, 2003, the director issued a notice of intent to deny the petition. In this notice, the director requested the following additional evidence: (1) a description of the job duties and education background of all of the petitioner's other employees, if any; (2) an explanation as to how the beneficiary will not engage in the day to day operations of the business; (3) copies of the Employer's State Quarterly Tax Returns with all attachments for the past two quarters, along with proof that payments have been made to the Internal Revenue Service for the petitioner; and (4) copies of the petitioner's Form 940 EZ Employers Annual Federal Unemployment Tax Return.

In response to the notice of intent to deny, counsel submitted the requested documentation and a letter dated October 29, 2003, which stated that the petitioner employs the beneficiary as General Manager and an assistant. Counsel noted that the petitioner's subsidiary, GAG Services, LLC, employs a store manager, a lead technician and two technicians, and that the petitioner's assistant also works for its subsidiary. In this supporting letter, counsel provided a description of duties for both companies' employees, including the following description of the beneficiary's duties:

He is responsible for directing and coordinating all operations in the USA with total decision making power in the following functions:

MMB International, LLC:

- Responsible for making decision related to purchasing of paper, which included the following:
 - Type and Qualities of Products
 - Formats and Presentation
 - Dates of production, delivery and reception.
 - Own specifications and conditions of each purchase.
- Negotiate with each one of the existing suppliers, searching on new products or opportunities related to the business of commercialization and conversion of papers and paperboards in the Venezuelan market.
- Supervise the operative and administrative operation of the corporation.
- Coordinate the preparation and presentation of financial statements of the corporation.
- Search of new opportunities of businesses and investments in the USA

GAG Services, LLC:

- Supervise the operative and administrative operation of the corporation.
- Initiate and to evaluate the commercial relations with the suppliers of goods and services that allows the normal operation of the corporation.
- Evaluate directly the performance of the store manager.
- Supervise the daily activity performed by the store manager[.]
- Evaluate jointly with store to [sic] manager the performance of all and each one of the members of the contracted personnel of the corporation.
- Analyze the inventory; jointly with store to [sic] manager and lead technician define the politics of purchase and stock of parts, lubricants and accessories that allow the best performance of the corporation.
- Hire, fix wages, increases and/or advantages for the personnel of the corporation.
- To establish commercial relations with corporate client to increase the volume of business.
- Identify; evaluate new business opportunities, products and or services that allow to increase the volume of business of the corporation.

Counsel concluded that the beneficiary can be considered a manager, as he manages/supervises two supervisory employees (the subsidiary's store manager and lead technician); and that the beneficiary qualifies as an executive since he directs the management of the organization, establishes goals and policies for the organization, exercises wide latitude in discretionary decision-making and is supervised by the Board of Directors. Finally, counsel stated that the beneficiary alternatively qualifies for L-1A status as a "functional manager since the Beneficiary has managerial control and authority over all functions and operations of the company and operates at a senior level within the organization's hierarchy."

In response to the director's request that the petitioner explain how the beneficiary will not engage in the day-to-day operations of the business, counsel stated:

As the General Manager, the Beneficiary is responsible for selecting, hiring and training personnel, purchasing merchandise and raw materials, directing the marketing and sales operations, managing all of the operations of the financial area, etc. The Beneficiary is the organization's top manager and his duties are **primarily** managerial or executive. For example the Beneficiary does not change the oil of a vehicle because those are the duties of the Lead Technician and Technician.

On November 10, 2003, the director denied the petition. The director determined that "at the time of filing the beneficiary is not primarily performing in a managerial or executive capacity since the beneficiary is not managing other professionals or managers. Furthermore, it would indicate the beneficiary would have to engage in the day to day business activities of the company given the current structure of the company."

On appeal, counsel for the petitioner asserts the record sufficiently demonstrates that the beneficiary will be performing managerial or executive duties and that the director failed to state her reasons for denying the petition. Counsel requests a "meaningful review" of the petition submitted.

The AAO concurs with counsel that the director's decision did not adequately specify her reasons for concluding that the beneficiary would not be employed in a managerial or executive capacity. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i).

However, upon review, the record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In this case, the petitioner claims that the beneficiary satisfies the requirements for both capacities. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive capacity and the statutory definition for managerial capacity if it is representing that the beneficiary is both an executive and a manager.

The AAO notes that much of the evidence related to the beneficiary's claimed managerial and executive status is based on his role as General Manager of GAG Services, LLC, a subsidiary of the petitioner which was organized in May 2003, and began doing business in June 2003, only three months prior to submission of the instant petition to extend with beneficiary's status with the petitioner, MMB International, LLC. The petitioner has not indicated that this petition is filed on behalf of its subsidiary, nor does it appear that the subsidiary has filed a separate petition on behalf of the beneficiary that would grant him authorization to work concurrently for this separate legal entity.

The regulation at 8 C.F.R. § 214.2(l)(7)(i)(C), governing amended petitions, states:

The petitioner shall file an amended petition, with fee at the Service Center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e., from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

See also, Memorandum of James J. Hogan, Executive Associate Commissioner, Operations, *Guidelines for the Filing of Amended H and L Petitions*, October 22, 1992 (stating that if an alien is transferred from one company to another company in the same organization and becomes the employee of the new company, an amended petition must be filed to allow CIS to determine if the new firm is related to the foreign firm in a qualifying capacity).

It appears from the record that the beneficiary devotes a significant portion of his time to the subsidiary's business and at the time of filing, was working on-site at the subsidiary's store. The petitioner has not provided an adequate explanation as to which company currently serves as the petitioner's employer. This information is critical, as CIS has not approved a qualifying relationship between the petitioner's subsidiary and the foreign entity. However, since the subsidiary company is not the petitioner, the AAO will consider the beneficiary's role only within the petitioner's organization in order to determine whether the beneficiary is employed in a managerial or executive capacity.

The petitioner's business activity at the time of filing was paper exporting, and there is evidence on record that the petitioner received commissions for purchasing paper which was exported to its affiliated companies in Venezuela. No other documentation or description of this aspect of the petitioner's business was provided. It is noted for the record that the petitioner also owned three rental properties that were purchased in 2001, prior to the beneficiary's assignment to his current position, and sold in January and February 2003. The petitioner does not provide a description of the beneficiary's duties as they related to management of this aspect of the business, and it did not own any rental properties at the time of filing, so the AAO can consider the beneficiary's duties only within the context of the petitioner's export business, which was not fully described in any of the supporting letters or documents.

On review, the petitioner initially provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner stated that the beneficiary's duties include "exercising discretion over the day-to-day operations of the company," responsibility for "all marketing and sales activities," "plot[ing] strategies for the expansion of business," and "identify[ing] and cultivat[ing] new information sources." The petitioner did not, however, provide examples of discretionary decisions made by the beneficiary, identify the company's business plans or clarify who actually performs the day-to-day operations of the company, including its marketing and sales activities. Further, the petitioner did not adequately describe its business operations so as to provide a context for evaluating the beneficiary's duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of*

California, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the petitioner describes the beneficiary as personally negotiating contracts for purchase of paper and "dealing with" the distributors, suppliers and shippers. It also appears that he is responsible for marketing activities, as he has only one subordinate employee, an assistant, whose job description does not include any marketing duties. Since the beneficiary actually negotiates routine contracts and markets the petitioner's services, he is performing a task necessary to provide a service or product and these duties will not be considered managerial or executive in nature. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In response to the director's notice of intent to deny the petition, the petitioner's former counsel was particularly concerned that the director was evaluating the beneficiary's duties in light of the staffing of the petitioner's organization. The language of the director's decision suggests that she relied at least partially upon an analysis of the petitioner's staffing levels in concluding that the beneficiary would be involved in the day-to-day operations of the business. However, in the instant case, the AAO finds that an evaluation of the petitioner's staffing levels is appropriate.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. Further in this case, the petitioner has noted that the beneficiary no longer devotes his full-time attention to the petitioner's export business, which raises the question of whether the petitioner even requires the services of a full-time manager at its current stage of development.

In this case, the petitioner was granted two years to open its new office. The record reveals that at the time of filing, the petitioner employed only the beneficiary and an assistant. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary **primarily** performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The petitioner revealed that the beneficiary's assistant was not devoting her full attention to the petitioner's business at the time of filing. Since the beneficiary has only a part-time assistant, the petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Further, regardless of the

beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the petitioner has not established that the U.S. company has been doing business since the approval of its new office petition in September 2001. Pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) a "new office" operation is allowed one year within the date of approval of the petition to support an executive or managerial position. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) require the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). In this case, the petitioner was granted two years to establish its new office, but is still required to establish that it was doing business during this entire period. The petitioner submitted evidence that it owned three rental properties 2001 and February 2003, and provided evidence of rent payments received between August 2002 and February 2003. The petitioner sold its real estate interests in February 2003 and was no longer engaged in this business. As evidence of its export business, the petitioner provided invoices for commissions earned by the petitioner between June 2002 and June 2003 only. Further, the joint business plan submitted by the petitioner and its new subsidiary, dated September 2003, was focused entirely on the oil change and lube business of the subsidiary and barely addressed any future plans for the petitioner's business, only that it would "continue to monitor the local real estate market and keep ready to buy rental properties." Additionally, it appears from the petitioner's most recent Forms 941 that it had relocated to its subsidiary's address, i.e., the oil change and lube store, and that it no longer maintained a separate premises from which to operate its export business. The beneficiary's work site is also located at the subsidiary company's store. Without additional evidence, the AAO cannot determine whether the petitioner was doing business during the period between September 2001 and June 2002, whether it was still operating its export business at the time the petition was filed, or whether it intended to continue doing business in a regular, systematic and continuous manner. For this additional reason, the petition cannot be approved.

Another issue in this proceeding, also not raised by the director, is whether the petitioner has established that there is a qualifying relationship between the U.S. entity and a foreign entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner claims to be a subsidiary of the foreign company, stating that "75% of the foreign entity shareholders own 100% of the U.S. company." Upon review of the record, it appears that the only qualifying relationship the petitioner could potentially establish is an affiliate relationship, rather than a parent-subsidiary relationship. 8 C.F.R. § 214.2(l)(1)(ii)(L) defines "affiliate" as:

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity,

In this case, the U.S. entity is owned by three individuals, with one individual owning 34%, and the others each owning 33% of the company. The foreign entity, Papeles Excelsior, C.A., is owned by one individual (25%) and one company, Inversiones Mebeli, C.A. (75%). The owners of this company are the same individuals who own the U.S. company. The petitioner claims that these three individuals exercise control over the foreign company as they have agreed to vote together with respect to their decisions regarding Inversiones Mebeli, C.A., which will allow them to control Papeles Excelsior, C.A. The petitioner submits a statement to this effect signed by the three owners on March 1, 2001.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). However, the petitioner has not provided the foreign company's stock certificates, articles of incorporation or any other documents that establish that the group of three individuals actually control the foreign entity, which has a fourth shareholder. The signed statement indicating that three shareholders will vote in concert with respect to the foreign company, addressed to the U.S. company's attorney, is not probative evidence that they in fact have a controlling interest in the foreign company. Absent documentary evidence, the petitioner has not established that the same legal entity or individuals control both entities. Thus, the companies are not affiliates as both companies are not owned and controlled by the same individuals. Therefore, the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of providing eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here that burden has not been met.

ORDER: The appeal is dismissed.